(3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

WRIT PETITION NO. 4052 /2004

PETITIONERS : 1. Director, Keystone Industries Ltd., Plant No. 18-26, Industrial Area, Nandini Road, Bhilai, District Durg (C.G.)

2. Vishnu Chemicals Pvt. Ltd, Plot No. 18-26, Industrial Area, Nandini Road, Bhilai, District Durg (C.G.)

-VERSUS-

RESPONDENTS : 1. Labour Court constituted under the Industrial Disputes Act, Durg (C.G.)

2. Meghdas Vaishnav, Vice-President, Chhattisgarh Chemical Mill Mazdoor Sangh, Labour Camp, Jamul, Bhilai, District Durg (C.G.)

P.R. No. 4048/04
Presented by Shri H.K. Sahu
dated 31/10/04

WRIT UNDER ARTICLE 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF A SUITABLE WRIT, ORDERS OR DIRECTION.

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 4052 of 2004

Petitioners	:	Director, Keystone Industries Ltd. & another
	-	Vs. –
Respondents	:	Labour Court constituted under the Industrial Disputes Act, Durg and another

ORDER

Post for 6 -2-2007

Sd/-
Satish K. Agnihotri
Judge

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 4052 of 2004

Single Bench: Hon'ble Shri Satish K. Agnihotri, J.

Petitioners : Director,Keystone Industries Ltd. & another

Versus

Respondents : Labour Court constituted under the Industrial Disputes Act, Durg & another

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Present:

Shri Rajeev Shrivastava with Shri Indrasen Sahu, Advocates, for the petitioners.

Smt. Sudha Bhardwaj, Advocate for respondent No.2

ORDER

(Passed on 6th Day of February, 2007)

This petition filed under Articles 226/227 of the Constitution of India challenges the validity of the award dated 06.08.2004, passed by the Labour Court under Industrial Disputes Act, Durg, in case No. 15/ID Act/Reference/1999.

(2). The facts in nutshell are that petitioner No.1 is a Director of Keystone Industries Ltd. and Petitioner No.2 is a Private Limited Company, styled as Vishnu Chemicals Pvt. Ltd., a transferee of the industrial establishment owned by petitioner No.1. Respondent No.2

raised a dispute before the Deputy Labour Commissioner, Chhattisgarh Region, Raipur. The said dispute was referred to the Labour Court/ respondent No.1 for adjudication on the following reference :

> "Whether the removal of Udayshyam and three others is just and legal, if not, what relief they are entitled to and what direction can be passed to the employer."

(3). Respondent No.2 filed a statement of claim (Annexure-P/2) before the Labour Court stating therein that the workers namely Udayshyam and three others were employed by petitioner No.1 and petitioner No.2 was the agent of petitioner No.1. Petitioner No.1 had closed his industrial establishment illegally in October, 1998. The said establishment was reopened on 06.01.1999 whereby the workers were forced to seek transfer or accept final payment. Before the closure, the employer had neither issued notice nor paid required compensation in accordance with the law. It was, therefore, prayed that the said workers be reinstated in service with full back-wages.

(4). Petitioner No.1 filed written statement (Annexure-P/3) and denied the averments of respondent No.2 to the extent that petitioner No.2 - Vishnu Chemicals Pvt. Ltd. was the agent of petitioner No.1. It was stated that petitioner No.2 was an independent Private Limited Company, registered under the Companies

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Act. It was further denied that the establishment of petitioner No.1 was illegally closed from October, 1998. The establishment was running in losses and it was not possible to continue production with recurring losses. Therefore, it was decided to close the establishment and after due notice to the workers and the Labour Commissioner, the establishment was closed w.e.f. 06.01.1999. It was further stated that the provisions of Industrial Disputes Act in regard to closure were followed. It was stated that all the workers were paid one month's pay, retrenchment compensation and encashment of un-availed portion of leave. All the workers accepted their final payment, except four workers who are represented through respondent No.2 in this writ petition. They categorically declined to accept final payment. The plant and machinery of petitioner No.1 was transferred vide lease agreement dated 21.01.1999 (Annexure-R/2) w.e.f. 28.12.1998. All the workers were duly retrenched in accordance with law and had accepted the final payment except the four workers represented through respondent No.2. It was further stated that notice of closure of the establishment under the Industrial Disputes Act was given to the Secretary, Government of M.P., Department of Labour and Employment endorsing copies to Labour Commissioner, Assistant Labour Commissioner, Employment Exchange, Durg. Individual notices to all the workers including these four workers were given on

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05.01.1999. Notice was also affixed on the notice board regarding closure of the establishment. Respondent No.2 amended its statement of claim subsequently on 26.07.2001 incorporating paras 8 (a) (b) and (c) stating that the transfer was made on 28.12.1998 and before that date provisions of Section 25 FF of the Industrial Disputes Act, 1947 (for short "I.D. Act") were not complied with. Thus, there was violation of provisions of Section 25 FF of the I.D. Act.

(5). The Labour Court framed the following issues :

"(i) Whether closure of the establishment on 06.01.1999 was legal and proper ?

(ii) Whether removal of the workers was valid ?

(iii) reliefs and expenses. "

The first two issues were answered in negation. The Labour Court held that petitioner No.1 - establishment employed more than 50 persons in the establishment, as such the employer was required to follow and comply with the provisions of Section 25 FF of the I.D. Act. It was held that the closure of petitioner No.1 - establishment was illegal as notice required under Section 25 FFA of the I.D. Act was to be given 60 days before the closure and the same was not done in the present case. It was further held that it was not a case of closure, but it was a case of transfer from petitioner No.1 - establishment to Petitioner No.2 and in that event also provisions of

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Section 25 FF have to be complied with. The Labour Court came to the conclusion that without following the provisions of law, petitioner No.1 had removed the workers represented through respondent No.2, thus, removal from service was illegal and the said workers are entitled to reinstatement in the new establishment of transferee company i.e. petitioner No.2. The Labour Court by award dated 06.08.2004 (P/12) accordingly directed reinstatement of the aforesaid workmen with full back-wages. Being aggrieved, the petitioners i.e. transferor and transferee companies filed this writ petition challenging the validity of the award.

(6). During the course of the argument, the petitioners have filed an application for not pressing the ground No.6.5, which was ordered as prayed.

(7). Shri Rajeev Shrivastava, learned counsel appearing for the petitioners would contend that the finding of the Labour Court that the industrial establishment in dispute was transferred to Vishnu Chemicals Pvt. Ltd. - Petitioner No.2 is correct. Udayshyam and three other workmen, who are represented through respondent No.2, are admittedly employees of petitioner No.1 and no direction can be issued to reinstate the said workmen in the establishment of petitioner No.2 which is a transferee establishment under the lease agreement dated 21.01.1999. This is also not the case of respondent No.2 that the workmen were the employees of petitioner No.2 establishment. The

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Labour Court has traveled beyond its terms of reference by directing reinstatement of the said workmen in the transferee establishment which was not an issue before the Labour Court. Learned counsel would further contend that closure of the establishment on 06.01.1999 and thereafter execution of the lease agreement between petitioners No.1 and 2 for transferring the establishment w.e.f. 28.12.1998 on 21.01.1999 was not unusual. The actual agreement was signed on 21.01.1999 after closure of the establishment for the purpose of transfer of the establishment. It was made effective from the earlier date and it does not change the character of transfer of the establishment. The Labour Court had completely ignored the fact that Section 25 FF of the I.D. Act provides for compensation to workmen in case of transfer of undertaking. It is clearly provided that every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25 F of the I.D. Act, as if the workman had been retrenched. Section 25 F of the I.D. Act contemplates one month's notice or one month's salary in lieu of such notice. Learned counsel would further contend that in the present case, there was no time to give one month's notice and the workmen including the present four workmen were given one month's salary in lieu of notice with retrenchment compensation and other admissible

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payments. Except these four workmen, all others have accepted the one month's salary, retrenchment compensation and other admissible final payments. Thus, the Labour Court was wrong in holding that the provisions of Section 25 FF and 25 FFA of the I.D. Act were not complied with. Once the Labour Court had held that it was a case of transfer of the establishment from petitioner No.1 to petitioner No.2, compliance of the provisions of Section 25FFA is not required and the Labour Court proceeded to declare the order of removal as bad on the basis of non-compliance of the provisions of Section 25 FFA of the I.D. Act.

(8). *Per contra,* Smt. Sudha Bhardwaj, learned counsel appearing for respondent No.2 would contend that there were more than 50 workmen in employment of the petitioner No.1. Learned counsel would further contend that petitioner No.1 had not given notice as required under Section 25 FFA of the I.D. Act before the closure of the disputed establishment. The said finding has not been challenged by respondent No.2 in any proceedings. Learned counsel also not disputed the fact that one month's pay with retrenchment compensation and encashment of un-availed portion of leave was offered to all the workers. Except these four workmen, all others were accepted the same. One month's pay was offered / paid in lieu of one month's notice as prescribed under Section 25 FF of the I.D.

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Act. Learned counsel also raised several other points which are not relevant for the purpose of adjudication of this case.

(9). I have heard Shri Rajeev Shrivastava with Shri Indrasen Sahu, Advocates for the petitioners and Smt. Sudha Bhardwaj, Advocate for respondent No.1 and perused the pleadings and records appended thereto.

(10). It is evident from the perusal of the documents appended thereto that the contention of the petitioners with regard to number of employees in the industrial establishment under the ownership of petitioner No.1 is not in dispute. Admittedly, there were more than 50 persons and the Labour Court has jurisdiction to deal with the matter. The fact of lease agreement between the petitioner No.1 and petitioner No.2 is also not disputed. Petitioner No.1 has decided to close the establishment and the same was closed w.e.f.06.01.1999. The information to that effect was given to the Assistant Labour Commissioner, Nehru Nagar, Durg (M.P.) vide letter dated 18.01.1999 (Annexure-P/10). All the workers including the present four workmen were offered one month's notice pay, retrenchment compensation and encashment of un-availed portion of leave, but, except these four workmen, all others accepted the final payment. Petitioner No.1 sought advice of the Assistant Labour Commissioner, Durg to deposit the amount in respect of these four workmen in the office of the Assistant Labour Commissioner. Initially, six workmen were declined

to accept the payment, but, thereafter two workmen accepted the payment, except the present four workmen. After closure of the establishment, the establishment was transferred vide lease agreement dated 21.01.1999 (R/2) to petitioner No.2 w.e.f. 28.12.1998. Accordingly, the Labour Court held that this was a case of transfer. The Labour Court, however, held the closure as illegal and on that basis held that the notice was required to be given 60 days before the closure under Section 25 FFA of the I.D. Act. The Labour Court thus directed reinstatement of the aforesaid four workmen with full back-wages. The Labour Court completely ignored the fact that once it has been held that this was a case of transfer of undertaking, Section 25 FFA of the I.D. Act would not be applicable and the provisions of Section 25 FF are applicable which provides for notice and compensation to every workman of the undertaking immediately before such transfer in accordance with Section 25 F of the I.D. Act, as if the workman had been retrenched. Section 25 F of the I.D. Act contemplates one month's notice in writing or one month's pay in lieu of such notice with retrenchment compensation. In the present case, admittedly, one month's notice pay with retrenchment compensation and encashment of un-availed portion of leave was offered to all the workmen. Except these four workmen, all others accepted the final payment. The Labour Court further committed serious error in directing reinstatement of these four workmen in

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petitioner No.2 establishment when it is nobody's case that these workmen were the employees of petitioner No.2- establishment. It is the case of respondent No.2 that they were the employees of petitioner No.1- establishment and petitioner No.1 is running its establishment, therefore, they should be reinstated in the petitioner No.1 - establishment. Thus, the order of the Labour Court is bad and deserves to be quashed.

(11). For proper appreciation of the dispute involved in this case, it is necessary to quote the relevant provisions i.e. Sections 25F, 25FF and 25FFA of the I.D. Act, which are as under :

> " **25-F. Conditions precedent to retrenchment of workmen.** No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until -
>
> (*a*)the workman has been given one months notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
>
> [1] [***]
>
> (*b*)the workman has been paid, at the time of retrenchment, compensation which shall be

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equivalent to fifteen days average pay [2][for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government [3][or such authority as may be specified by the appropriate Government by notification in the Official Gazette].

25-FF. Compensation to workmen in case of transfer of undertakings. - Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to or that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25-F, as if the workman had been retrenched:

Provided that nothing in this section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if -

(a) the service of the workman has not been interrupted by such transfer;

(b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those

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applicable to him immediately before the transfer; and

(c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer

25-FFA. Sixty days notice to be given of intention to close down any undertaking. - (1) An employer who intends to close down an undertaking shall serve, at least sixty days before the date on which the intended closure is to become effective, a notice, in the prescribed manner, on the appropriate Government stating clearly the reasons for the intended closure of the undertaking:

Provided that nothing in this section shall apply to -

(a) an undertaking in which -

(i) less than fifty workmen are employed, or

(ii) less than fifty workmen were employed on an average per working day in the preceding twelve months,

(b) an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work of project.

(2) Notwithstanding anything contained in sub-section (1), the appropriate Government may, if it is

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satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary so to do, by order, direct that provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order. "

(12). A Constitution Bench of the Hon'ble Supreme Court in **Anakapalle Co-operative Agricultural and Industrial Society Ltd. Vs. Workmen and others** [1] held as under :

" Therefore, reading S.25-FF as a whole, it does appear that unless the transfer falls under the proviso, the employees of the transferred concern are entitled to claim compensation against the transferor and they cannot make any claim for re-employment against the transferee of the undertaking. "

(13). The Hon'ble Supreme Court in **The Board of Directors of the South Arcot Electricity Distribution Co.Ltd. Vs. N.K. Mohammed Khan etc.** [2] held as under :

" It appears to us that the language of that principal clause makes it perfectly clear that, if the right to retrenchment compensation accrues under it, it must be a right to receive that compensation from the previous employer who was the owner up to the date of transfer. It is implicit in the language of that clause. The clause lays down

that every workman mentioned therein shall be entitled to notice and compensation in accordance with the provisions of Section 25-F as if the workman had been retrenched. Obviously, in such a case, the date of the deemed retrenchment would be the date when the ownership or management of the undertaking stands transferred to the new employer. In the present case, that date would be the 1st of June, 1957, when the undertaking of the company was taken over by the Government of Madras under the Madras Act. If the workmen's services are to be deemed to be retrenched on that very date, it is clear that, for purposes of determining who has retrenched the workmen and who is liable to pay the retrenchment compensation, the workmen could not become the employees of the new employer. The employment under the new employer could only commence from the time when the ownership or the management of the undertaking vested in the State Government; but, simultaneously with this vesting, the workmen had to be deemed to be retrenched from service. That retrenchment could, therefore, be deemed to have been made only by the previous employer. Further, it would be that previous employer who would be competent to give the notice in accordance with the provisions of Section 25-F of the Act. The notice of retrenchment, which has to be deemed to have become effective on the date of vesting of the undertaking in the State

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Government, could not possibly be given by the State Government. In these circumstances, the conclusion is irresistible that the claim under Section 25-FF of the Act to compensation accrues to the workmen against the previous employer under whom he was employed until the date of transfer."

(14). The Hon'ble Supreme Court in **Payment of Wages Inspector, Ujjain Vs. Surajmal Mehta, Director, The Barnagar Electric Supply and Industrial Co. Ltd.**[2] held as under :

"That being the position a workman whose service is terminated in consequence of a transfer of an undertaking, whether by agreement or by operation of law, has a statutory right under Section 25-FF to compensation unless such right is defeated under the proviso to that section. The same is the position in the case of closure under Section 25-FFF. Such compensation would be wages as defined by Section 2(*vi*)(*d*) of the Act as it is a "sum which by reason of the termination of employment of the person employed, is payable under any law .... which provides for the payment of such sum whether with or without deductions but does not provide for the time within which the payment is to be made". Since Sections 25-FF and 25-FFF do not contain any conditions precedent, as in the case of retrenchment under Section 25-F, and transfer and closure can validly take place

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without notice or payment of a month's wages in lieu thereof or payment of compensation, Section 25-FF can be said not to have provided any time within which such compensation is to be paid. It is well established that the words "in accordance with the provisions of Section 25-F" in Sections 25-FF and 25-FFF are used only as a measure of compensation and are not used for laying down any time within which the employer must pay the compensation. It would, therefore, appear that compensation payable under Sections 25-FF and 25-FFF read with Section 25-F would be 'wages' within the meaning of Section 2(*vi*)(*d*) of the Act."

(15). The Hon'ble Supreme Court in **Gurmail Singh and others Vs. State of Punjab and others** [4] while dealing with a transfer of undertaking to instrumentality of the State, held as under :

"21. To sum up, even before the insertion of Section 25-FF in the Act, the employees of a predecessor had no right to claim re-employment by the successor in business save in exceptional circumstances. Even where available, that claim was not a matter of absolute right but one of discretion, to be judicially exercised, having regard to all the circumstances. An industrial tribunal, while investigating such a claim, had to carefully consider all the aspects of the matter. It had to examine whether the refusal to give re-employment was capricious and industrially

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unjustified on the part of successor in business or whether he could show cause for such refusal on reasonable and bona fide grounds such as want of work, inability of the applicant to carry out the available work efficiently, late receipt of the application for re-employment in view of prior commitments or any other cause which in the opinion of the tribunal made it unreasonable to force the successor-in-interest to give re-employment to all or any of the employees of the old concern. This discretion given to industrial courts is no longer generally available because of the insertion of Section 25-FF. But in a case where one or both of the parties is a State instrumentality, having obligations under the Constitution, the court has a right of judicial review over all aspects of transfer of the undertaking. It is open to a court, in such a situation, to give appropriate directions to ensure that no injustice results from the changeover. In the present case, the parties to the transfer are a State on the one hand and a fully owned State Corporation on the other. That is why we have examined that terms and conditions of the transfer and given appropriate directions to meet the needs of the situation. We, therefore, direct the State Government and the Corporation which is but a wholly owned State instrumentality bound to act at the behest of the State to carry out our directions above, the Corporation being at liberty

to amend its rules and regulations, if necessary, to give effect to the same."

(16). In the present case, the transfer by lease agreement is not disputed and the averment of respondent No.2 that petitioner No.1 is still running its establishment through petitioner No.2 has not been found proved. Thus, respondent No.2 had only right to claim compensation from the earlier employer, but had no right to claim employment by the successor in business. There is no clause to the effect that transferee i.e. successor in business shall be liable to take services of the workmen employed by the transferor - company i.e. petitioner No.1.

(17). In the case of **General Labour Union (Red Flag) Bombay Vs. B.V. Chavan and others** [5], relied on learned counsel appearing for respondent No.2, the dispute involved was with regard to complaints that the employer was guilty of imposing and continuing lock-out and thus, committed unfair labour practice, wherein the Hon'ble Supreme Court held that ' when unfair labour practice is alleged by the workmen on the ground of resorting to lock-out the true test for the Industrial Court would be to determine whether, keeping in view all the relevant circumstances at the time of closure, the closure was a device or pretence to terminate services of workmen or whether it

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was *bona fide* and for reasons beyond the control of the employer. The said case is not applicable to the facts of the present case.

(18). In **Karnataka Power Transmission Corporation Ltd. and another Vs. Amalgamated Electricity Co. Ltd. and others** [6] relied on by learned counsel for respondent No.2, the Hon'ble Supreme Court held as under :

> " Even as per Section 25-FF of the Industrial Disputes Act, 1947, where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25-F thereof. These workers were not paid any such compensation as per Section 25-F. "

(19). In the present case, pay in lieu of one month's notice as required under Section 25F of the I.D Act with compensation was offered / paid to the workers of the establishment owned by petitioner No.1. All the workers accepted final payment, except these four workers.

(20). In **Ram Pravesh Singh and others Vs. State of Bihar and others** [7], the Hon'ble Supreme Court observed as under :

> " Further, the assumption that whenever an undertaking is taken over, transferred or purchased, the transferee or purchaser should continue the services of the employees of the erstwhile owner of the undertaking, is not sound. In fact, statutory provisions seem to indicate otherwise. Section 25-FF of the Industrial Disputes Act, 1947 provides that where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25-F, as if the workman had been retrenched, except in the cases mentioned in the proviso thereto. Therefore, the natural consequences of a transfer of an undertaking, unless there is a specific provision for continuation of the service of the workmen, is termination of employment of its employees, and the employer's liability to pay compensation in accordance with Section 25-F. "

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(21). The judgments in the cases of **M.C.D. Vs. State of Delhi (2005) 4 SCC 605; Haryana Roadways Vs. Rudan Singh (2005) 5 SCC 591 ; and Management of Madurakantam Co-operative Sugar Mills LTd. Vs. S. Vishwanatham (2005) 3 SCC 193** , relied on by learned counsel appearing for respondent No.2 are not relevant to the facts and the dispute involved in this case.

(22). In the case in hand, the three conditions of proviso that the service of the workman has not been interrupted by such transfer; the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer, are not available to the said workers. The services of the workmen have not been transferred to the successor owner and there was no provision under the agreement for transfer of services of any workman.

(23). As a result, for the reasons stated hereinabove, this writ petition is allowed. The aforesaid four workers represented through respondent No.2 are entitled to one month's pay in lieu of notice with

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compensation and encashment of un-availed portion of leave. In the facts and circumstances of the case, no order as to costs.

Sd/-
Satish K. Agnihotri
Judge

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1. AIR 1963 SC 1489
2. (1969) 1 SCC 192
3. AIR 1969 SC 590
4. (1991) 1 SCC 189
5. (1985) 1 SCC 312
6. (2001) 1 SCC 586
7. (2006) 8 SCC 381

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